In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1312

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD G. AUGENBLICK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

1. We submit this Reply Brief to correct an erroneous impression that may be created by the assertion in the Brief in Opposition for Respondent Augenblick (at pp. 15, 18) that the government's petition in these cases makes *"for the first time in this Court"* (emphasis in original) the contention that the jurisdiction of the civil courts to review court-martial convictions collaterally is limited to *habeas corpus*. On the contrary, however, we have repeatedly stated this position in opposing petitions for certiorari where the Court of Claims, after examining the merits, refused to award back pay judgments to persons contending that their court-martials were invalid. See, e.g., *Graham* v. *United States*, October Term, 1966, No. 732,

Brief for the United States in Opposition at pp. 7–9 (certiorari denied, 353 U.S. 917); *Krivoski* v. *United States*, October Term, 1956, No. 533, Brief for the United States in Opposition, pp. 9–11 (certiorari denied, 352 U.S. 954); *Griffiths* v. *United States*, October Term, 1959, No. 184 Misc., Brief for the United States in Opposition at pp. 7–8 (certiorari denied, 361 U.S. 865); *Begalke* v. *United States*, October Term, 1960, No. 259 Misc., Brief for the United States in Opposition at pp. 4–5 (certiorari denied, 364 U.S. 865); *Narum* v. *United States*, October Term, 1961, No. 114 Misc., Brief for the United States in Opposition at pp. 5–7 (certiorari denied, 368 U.S. 848); *Anderten* v. *United States*, October Term, 1961, No. 737 Misc., Brief for the United States in Opposition at pp. 7–9 (certiorari denied, 368 U.S. 1004).

2. Moreover, as our petition makes clear, the issue which the instant cases pose is not only whether the Court of Claims has any authority to declare court-martial convictions void. Assuming that the Court of Claims and other federal civil courts have some role in this area, a vital question remains: What are the proper limits of such collateral review. From the date of its decision in *Shapiro* v. *United States*, 69 F. Supp. 205, in 1948, when the Court of Claims, relying on *Johnson* v. *Zerbst*, 304 U.S. 458, first held that it could review court-martials for constitutional violations of a "jurisdictional" nature,[1] until the present cases, the Court of Claims exhibited great restraint in

[1] *Shapiro* was a case in which the Court of Claims viewed the denial [illegible]

exercising the power it asserts.[3] In only one other case,[4] also involving a pre-U.C.M.J. court-martial, did the court award back pay despite a military conviction. However, in the present cases, the Court of Claims has, in our view for the first time, exercised its asserted jurisdiction over courts-martial by engaging in the sort of expansive inquiry normally associated with direct review by an appellate tribunal. Thus, these cases sharply frame for consideration by this Court the questions whether any court-martial review jurisdiction exists and, if so, what its proper scope may be.

3. One further clarification is in order. Respondent Augenblick argues that the legislative history of Article 76 of the U.C.M.J. indicates that Congress was merely codifying prior law, which, in respondent's view, authorized review of court-martial convictions in back pay actions. However, prior rulings of this Court had indicated that *habeas corpus* was the sole method of review,[5] and it was apparent that the responsible

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[3] Insofar as the earlier cases cited by respondent Augenblick (at p. 18) involve Court of Claims review of court-martials, they cast little light on the issue raised by the petition. They were decided at a time when there was no finality provision in the Articles of War; there was no civilian review body within the military system comparable to the Court of Military Appeals; and judicial concepts of the grounds for collateral review were entirely different.

[4] *Shaw* v. *United States*, 357 F. 2d 949 (1966), where the court held, relying on the position of the Court of Military Appeals (which could not consider the case because it involved a pre-U.C.M.J. offense), that the serviceman's conduct could not constitutionally be regarded as criminal.

[5] *Wales* v. *Whitney*, 114 U.S. 564, 570; *In re Yamashita*, 327 U.S. 1, 8.

Committees, as well as at least some members of Congress, regarded these rulings as representing the law which Article 76 codified. In any event, even if Article 76 be viewed as permitting collateral back pay actions as well as *habeas corpus*, both decisional law and the legislative history remain opposed to respondent's position on the second issue in this case—*i.e.*, the extent of the Court of Claims' jurisdiction to review court martials. Nothing whatever in prior law suggests, much less authorizes, collateral review—in any form of proceeding—for the type of errors allegedly involved in the cases sought to be reviewed.

Accordingly, the petition for writs of certiorari should be granted to consider these questions.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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[1] In addition to the material from the Committee reports quoted in our petition (at p. 15, n. 11), the following language from the House Report explicitly recognizes the constitutional basis for the *habeas corpus* exception to finality—thus refuting the position of the Court of Claims that there is no basis for distinguishing the constitutional right of *habeas corpus* from other forms of collateral review:

> In view of the fact that this is to be a judicial tribunal and to be the court of last resort for court-martial cases, *except for the constitutional right of habeas corpus*, we concluded that it should be designated by a more appropriate name, *i.e.*, Court of Military Appeals, rather than the previously-suggested judicial council.

H. Rep. 491, 81st Cong., 1st Sess. at p. 7 (emphasis added).

[2] See remarks of Senator Kefauver, quoted in Brief in Opposition for Respondent Augenblick (at p. 22).

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